APPENDIX A

Effect of merger

FILE COPY

In the Supreme Court of the United States

No. 469.

OCTOBER TERM, 1960

THOMAS W. ALEXANDER,
Petitioner,

vs

BUCKEYE CELLULOSE CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

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The brief of counsel for the respondent calls attention to an uncertainty in the petition for certiorari. We may have been too brief, thinking that the cases we now refer to were so well known there was no need to refer to them.

1. We interpreted the Court of Appeals opinion as indicating concern as to intent because that Court said:

> "The finding of a new promise to pay which would start the statute of limitations running again must necessarily be dependent upon the intent of the parties."

That being the conclusion we insist that what that intent was is a question of fact. Therefore we referred to *Porello* just as the opinion later in *Ryan* did (350 U. S. at p. 144). Both held intent a question of fact. The Court of Appeals acted on it as though intent were a question of law.

2. The basis of our reliance on Title 28, U. S. C. 1652, 62 Stat. 944 is four opinions published in one volume all

decided within a span of fourteen days. The four are landmarks and as we interpret them emphasize the fact that it was error not to decide the case in accord with the local or applicable law as expressed by the Ohio case of the Hamilton County Court of Appeals, *Lehman Bros. v. Piggly-Wiggly Corp.*, 103 N. E. 2d 399. The cases are *Fidelity Union Trust Co. v. Field*, 311 U. S. 169, *Six Companies of Cal. v. Joint Highway Dist.*, 311 U. S. 180, *West v. A. T. & T.*, 311 U. S. 223, and *Stoner v. N. Y. Life Co.*, 311 U. S. 464.

3. We referred to Rule 19(b) as a basis for the petition. That Rule appears to us to state that a petition may be granted on (a) conflict with this Court, (b) conflict with applicable decision of this Court and (c) departure from the accepted and usual course.

The conflicts and departure we rely on are the use of the Summary Judgment, Rule 56, to dispose finally of the case. There are three cases that deal solely with the practice under Rule 56. All three are landmarks, are well known and we say conclusive. These cases are: *Sartor v. Arkansas Natural Gas*, 321 U. S. 620, *Kennedy v. Silas Mason Co.*, 334 U. S. 249, and *Fountain v. Filson*, 336 U. S. 681. Not so compelling, but significant is *Begnaud v. White* (CA 6th), 170 F. 2d 323.

4. Argument in an attempt to bring out the effect of the point raised as to intent.

In the Common Law, by the late Justice Holmes, he seems to regard intent as questions of fact. On page 303 he says:

> "The very office of construction is to work out, from what is expressly said and done, what would have been said with regard to events not definitely before the minds of the parties, if those events had been considered. * * *"

He follows this on pages 334-335 with this statement:

> "The law means to carry out the intention of the parties, and, so far as they have not provided for the event which has happened, it has to say what they naturally would have intended if their minds had been turned to the point. * * *"

In the Ohio Statute set forth in the Appendix of Respondent the words "liability" or "liabilities" do not occur. However, the merger agreement appears to have intended to go beyond the requirement of the statute and the amended complaint alleged:

> "* * * the merger agreement provided the defendant The Buckeye Cellulose Corporation should be the Continuing Corporation and that as the Continuing Corporation all liabilities of the Constituent Corporations should attach to it, the plaintiff averring that said agreement was executed in October, 1955, and the plaintiff further averring that all liabilities of the Constituent Corporations are liabilities of the Continuing Corporation, the defendant herein * * *."

Those who drafted the merger agreement had the Ohio Statute before them. It is presumed they used the word "liabilities" with intent to broaden the agreement; they were aware of the discussion of the word in *Black's Law Dictionary* and in *Mayfield vs. First National Bank* (C.A. 6th), 137 Fed. (2d) 1013.

The case should not have been disposed of under Rule 56.

Respectfully submitted,

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